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Supreme Court, U.S.
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No. 99 -

In The Supreme Court Of The United States

MARLAN EVERETTE ENGLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition For Writ Of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Did the holding of the courts below violate the Petitioner's constitutional rights and conflict with the decisions of courts in other circuits by ruling that the money-laundering count of the indictment of the Petitioner was not duplicitous, despite the fact that it alleged multiple financial transactions in violation of 18 U.S.C. § 1956, in contravention of the well-established rule that the unit of prosecution for § 1956 violations is one transaction?

II. Did the verdict of the district court violate the due process rights of the Petitioner because the district court adopted an overly broad view of conspiracy and thus permitted legally insufficient evidence to convict the Petitioner?

III. Can the government prove that a financial transaction was money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) without direct proof either that the funds involved in the transaction were the proceeds of an illegal activity or that the transfer was made with the intent to further that activity?

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OPINIONS AND ORDERS BELOW

The ruling of the United States Court of Appeals for the Eleventh Circuit affirming the conviction of the Petitioner, dated May 10, 1999, is set out in the Appendix at A-4. The order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc, dated August 5, 1999, is set out in the Appendix at A-18.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The order of the United States Court of Appeals for the Eleventh Circuit affirming the conviction of the Petitioner was entered on May 10, 1999. The final judgment of the United States Court of Appeals for the Eleventh Circuit, an order denying a Petition for Rehearing and Suggestion for Rehearing En Banc, was rendered on August 5, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law[.]

18 U.S.C. § 1956(a)(1)(A)(i) provides:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to

conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity...

. . . .

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

21 U.S.C. § 846 provides:

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Fed. R. Crim. P. 8(a) provides:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

STATEMENT OF THE CASE

Proceedings Below

The Petitioner, Marlan Everette Engle, was named along with twelve other codefendants in a three-count indictment dated March 27, 1996. Count I of the indictment charged that from at least April 13, 1993 to March 27, 1996 Engle conspired with Oscar Hernan Pena, Miguel A. Garrido, Daaiyah Jameelah Mustafa, Douglas Gene Mayberry, Precious Inita Willis Mayberry, George Charles Chilikas, Tony Laverne Pruitt, Meredith Johnson, Monica Kenlon Saunders, Jason Ray Sweatman, Terry Dean, James Edward Johnson II, and other persons known and unknown, to distribute and possess with intent to distribute marijuana in violation of 21 U.S.C. § 846. Count II of the indictment alleged that Engle and his codefendants, aided and abetted by others, willfully conducted financial transactions affecting interstate commerce using the proceeds of the distribution of a controlled substance with the intent to promote the carrying on of that unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 2. Count III of the indictment contained a demand for forfeiture of $415,000 in assets derived from the activities alleged in Counts I and II, pursuant to 18 U.S.C. §§ 1956, 981, and 982, and 21 U.S.C. § 853(p). Count III was later dismissed on the motion of the United States. After entering a plea of not guilty, Engle was tried along with codefendants Pena, Garrido, Mustafa, Pruitt, James Johnson, and Douglas and Precious Mayberry before a jury in the United States District Court for the Middle District of Alabama, the Honorable Truman M. Hobbs presiding, beginning on December 9, 1996. Engle was found guilty on both counts on December 18, 1996 and was sentenced on March 5, 1997 to a term in prison of 240 months on Count I and 240 months on Count II, to be served concurrently.

Engle appealed his conviction to the United States Court of Appeals for the Eleventh Circuit, arguing that (1) the district court erred in failing to dismiss Count II of the indictment on the basis that it was duplicitous and prejudicial, (2) the evidence introduced at trial was insufficient to prove the single conspiracy alleged in Count I of the indictment, (3) the evidence was insufficient to prove that Engle was guilty under Count II, which alleged money laundering, and (4) the district court erred in computing the offense level of Engle. Without addressing the issues raised by Engle, the Court of Appeals issued an opinion affirming the conviction of Engle on May 10, 1999. Engle's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals on August 5, 1999.

Statement of the Facts

The charges against Engle and his codefendants resulted from an investigation begun in 1995 by the Internal Revenue Service into a series of Western Union monetary transfers between individuals in Alabama and locations in California and Texas. The government alleged at trial that the wire transfers of money, which supposedly involved $405,221.80 between April 13, 1993 and January 27, 1996, were related to the trafficking of a large amount of marijuana between California, Texas, and Alabama.

The government argued at trial that the marijuana trafficking was accomplished by a large single conspiracy directed by Engle and Douglas Mayberry. In support of its theory, the government introduced evidence against Engle and his codefendants consisting of Western Union records that described the monetary transfers, telephone records from alleged coconspirators, testimony from various police officers regarding arrests of alleged coconspirators, and testimony from several alleged coconspirators who agreed to cooperate with the

government in exchange for giving favorable testimony. However, Engle's name appeared on only a few wire transfer records, totaling about $1,800, and the government presented no direct evidence to show that these transfers involved drug transactions.

The leading testimony from alleged coconspirators of Engle came from Steven Thompson, Danette McReath, and Jason Sweatman, who each testified that they had obtained marijuana from Engle, or on behalf of Engle, for the purpose of selling it. These witnesses did not testify that there was a conspiratorial relationship between Mayberry and Engle. Other witnesses for the government testified primarily regarding their relationships with Mayberry or his drug couriers.

ARGUMENT

I. THE RULING OF THE COURTS BELOW THAT THE MONEY-LAUNDERING COUNT OF THE INDICTMENT WAS NOT DUPLICITOUS WAS VIOLATIVE OF ENGLE'S CONSTITUTIONAL RIGHTS AND IS IN CONFLICT WITH THE RULINGS OF COURTS IN OTHER CIRCUITS.

Count II of the indictment against Engle alleged:

> From an unknown date but commencing at least as early as the 13th day of April, 1993, and continuing up to on or about the 17th day of January, 1996, . . . [the named defendants] did knowingly and willfully conduct, attempt to conduct and cause to be conducted financial transactions affecting interstate commerce, to wit: the sending and receiving of monies wired

> through Western Union's Nationwide Network, using the proceeds of a specified unlawful activity, that is the distribution of a controlled substance[.]

Count II of the indictment was plainly duplicitous, as it alleged a series of financial transactions between April 13, 1993 and January 17, 1996 as being violative of 18 U.S.C. § 1956(a)(1)(A)(i), which prohibits using the proceeds of a specified unlawful activity in a financial transaction "with the intent to promote the carrying on of specified unlawful activity." Fed. R. Crim. P. 8(a) provides:

> Two or more offenses may be charged in the same indictment or information *in a separate count for each offense* if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(Emphasis added.)

A duplicitous indictment charges two or more separate and distinct crimes in a single count. *United States v. Burton*, 871 F.2d 1566 (11th Cir. 1989). Such an indictment precludes any assurance of jury unanimity and may prejudice a subsequent double-jeopardy defense arising out of the same conduct. A general verdict on a duplicitous count does not reveal exactly which crimes the jury found the defendant had committed. *United States v. Conley*, 826 F. Supp. 1536 (W.D. Pa. 1993).

The determination by the courts below that Count II was not duplicitous conflicted with the decisions of courts in

other circuits which have considered the issue. For example, in *United States v. Conley*, the court dismissed an indictment which charged a violation of the money-laundering statute, 18 U.S.C. § 1956, by describing a series of alleged transactions "on or about the period 1988 and 1989." *Id.* at 1538. As in this case, the defendant challenged the indictment based on its duplicity. In evaluating the defendant's argument, the court first examined the language of the statute to determine that a course of conduct was not an allowable unit of prosecution. Rather, the court concluded, "the intended allowable unit of prosecution under Section 1956(a)(1)(A)(i) is manifest in the language of the statute itself and the allowable unit of prosecution comprises *only one 'financial transaction.'*" Id. at 1543 (emphasis added). The court later reiterated:

> Without further belaboring the point, the statute makes repeated references to single transactions. The only reference to a "transaction or series of related transactions" is made in section (f)(2). That section defines the scope of Congress's assertion of extraterritorial jurisdiction. It plays no part in Congress's definition of the offense and the allowable unit of prosecution.
>
> The words of the statute are plain and unambiguous. Congress defined the offense and the allowable unit of prosecution. The allowable unit of prosecution under section 1956(a) is each individual "financial transaction." *Accord United States v. Martin*, 933 F.2d 609, 611 (8th Cir. 1991). The meaning of the statute being plain, resort to the statute's legislative history is unwarranted, and unfavorable to the Government in any event.

Id. at 1543-44 (footnote omitted). The court then concluded that alleging money laundering over a period of time as a continuous, course-of-conduct offense is improper in that Congress has defined no such offense. *Id.* at 1544.

In *United States v. Prescott*, 42 F.3d 1165 (8th Cir. 1994), the Eighth Circuit also held that an indictment count charging the defendant with money laundering was defective and duplicitous in that it alleged multiple transactions rather than a single transaction.

The present case thus demonstrates a split in the circuits on this important issue. Moreover, the significance of the issue to Engle and to defendants in general is reflected in the discussion in *United States v. Conley* in which the court discussed the prejudice resulting from a duplicitous count that charged an unspecified number of unidentified money-laundering crimes over a broad period of time. As the court found, such an indictment would not protect the defendant from double jeopardy in the event of subsequent prosecutions relating to similar conduct, despite the government's allegation that the indictment would simply preclude all efforts to prosecute for money laundering in the described manner during that period of time. Of course, neither the government nor the court could control the double-jeopardy effect of a trial in the case before it on a subsequent prosecution.

Review by this Court is needed to address this important issue and to resolve the conflict now existing in the circuits.

II. THE VERDICT OF THE DISTRICT COURT VIOLATED THE DUE PROCESS RIGHTS OF ENGLE BECAUSE THE DISTRICT COURT ADOPTED AN OVERLY BROAD VIEW OF CONSPIRACY AND THUS PERMITTED LEGALLY INSUFFICIENT EVIDENCE TO CONVICT ENGLE OF THE SINGLE CONSPIRACY ALLEGED IN COUNT I OF THE INDICTMENT.

Fifty years ago, Justice Jackson cautioned against the consequences of the increasing trend in criminal prosecutions for defendants to be charged with broad conspiracies. In *Krulewitch v. United States,* 336 U.S. 440, 445 (1949), he noted what to him was already in those days a "drift" of the "elastic, sprawling, and pervasive offense" of conspiracy so advanced as to demonstrate the "tendency of a principle to expand itself to the limit of its logic." This led him to warn:

> The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a *serious threat to fairness in our administration of justice.*

Id. at 445. As was noted in *United States v. Giunta*, 925 F.2d 758, 765 (4th Cir. 1991), *overruled on other grounds, United States v. Burgos*, 94 F.3d 849 (4th Cir. 1996), Justice Jackson's sober assessment, made long before the "war on drugs" began significantly to afflict the justice system along with society in general, was picked up some thirty years later by Judge Goldberg in *United States v. Caro,* 569 F.2d 411, 418 (5th Cir.1978), a drug conspiracy case. Writing with the national "war on drugs" now heavily underway in the federal courts,

Judge Goldberg, in the course of reversing a conviction for insufficiency of the evidence, found guidance for the task of assessing the evidence in Justice Jackson's foreboding about the special threat to fairness posed by conspiracy prosecutions in general. As Judge Goldberg noted, those forebodings about the pervasive use of conspiracy counts had been borne out in the ensuing thirty years during which conspiracy had remained a "potent and oft-used weapon in the prosecutorial arsenal." *Id.* at 418. For him, the special threat long since recognized by Justice Jackson and borne out in intervening experience required the exercise of caution in viewing the "slippery facts and the speculations necessary to uphold [the conspiracy] conviction" there at issue. *Id.*; *see United States v. Giunta*, 925 F.2d at 765-66. The court in *Giunta* also emphasized that heightened vigilance was needed in drug-conspiracy cases:

> [T]he very "elasticity" of the conspiracy concept may and frequently does tend to produce more "slippery" facts in proof than do prosecutions for less "elastic" substantive offenses, with a corresponding greater danger that speculation rather than reason may be required to make the necessary leaps of inferences to find guilt. Heightened vigilance to guard against the increased risks of speculation, though not a heightened standard, is warranted in conspiracy prosecutions.

925 F.2d at 766.

This case presents a compelling example of how conspiracy prosecutions have been stretched beyond the limits of logic, with the result that Justice Jackson's fears regarding a serious threat to the fair administration of justice have been realized. This Court must agree to hear this case as a means of limiting the overly broad scope of conspiracy prosecutions and

to provide guidance to lower courts to show that there must be reasonableness in applying conspiracy statutes.

Even a cursory review of the facts in this case shows that the government failed to meet its burden of proving beyond a reasonable doubt that there was a single conspiracy between the defendants. In particular, the government failed to prove that Engle and Mayberry, whom the government theorized were the two alleged leaders of the named single conspiracy, agreed together to conduct their operations jointly in a single conspiracy. Rather, the evidence, taken in the light most favorable to the government, showed at best that Engle and Mayberry were each involved in some way in selling marijuana and that some individuals who at times were involved with one were later involved with another, but it failed to prove that Engle and Mayberry had entered into an agreement to jointly engage in an illegal enterprise. Moreover, Engle was clearly prejudiced by the variance between the allegations in the indictment and the evidence introduced at trial, for the voluminous evidence presented by the government against Mayberry and his confederates had a prejudicial impact against Engle, both at trial in determining guilt or innocence and at sentencing in determining Engle's offense level under the Sentencing Guidelines.

This Court has recognized that where the indictment charges a single conspiracy but the evidence introduced at trial demonstrates multiple conspiracies the defendants' convictions must be reversed where the defendants were prejudiced by the variance between the indictment and the evidence. *Kotteakos v. United States*, 328 U.S. 750 (1946). A jury's determination that the evidence supports the single conspiracy charged in the indictment is violative of due process and may be reversed if the court determines that it is not supported by substantial evidence. *See Jackson v. Virginia,* 443 U.S. 307 (1979); *United States v. LaSpesa,* 956 F.2d 1027 (11th Cir. 1992). In

determining the existence of a single conspiracy, the court must examine three factors: (1) whether the conspirators shared a common goal, (2) the nature of the scheme, and (3) the overlap of participants. *United States v. Khoury,* 901 F.2d 956 (11th Cir. 1990). A defendant is prejudiced by a variance where the indictment charges a single conspiracy but the proof demonstrates multiple conspiracies, where the evidence at trial differs so greatly from the charges in the indictment that the defendant is unfairly surprised and has an inadequate opportunity to prepare a defense, or where there are numerous defendants and the evidence shows multiple conspiracies so that the jury may inadvertently and improperly transfer evidence regarding defendants in one conspiracy to a defendant involved in another conspiracy. *United States v. Reed,* 980 F.2d 1568 (11th Cir. 1993).

It is well established that in a narcotics conspiracy prosecution, as in other prosecutions, guilt may not be assumed solely through close association between persons. *United States v. Jenkins,* 779 F.2d 606 (11th Cir. 1988); *United States v. Sarro,* 742 F.2d 1286 (11th Cir. 1984). The government is obligated to prove that there was an agreement between individuals to cooperate for the purpose of violating narcotics laws. *United States v. Farris,* 77 F.3d 391 (11th Cir. 1996). There must be substantial evidence establishing a unity of purpose, the shared intent to achieve a common goal, and an agreement to work together toward that goal. *United States v. Burgos,* 94 F.3d 849 (4th Cir. 1996).

The government's evidence in this case failed to prove any agreement, either expressed or implied, between Engle and Mayberry, that would permit the conclusion that Engle could be culpable in connection with the amount of marijuana trafficking attributed to Mayberry. As a result, Engle was unfairly and seriously prejudiced by the ruling of the district court, and its affirmance by the Eleventh Circuit, that the scope

of conspiracy under 21 U.S.C. § 846 was broad enough to convict Engle in this case of conspiring with Mayberry. Accordingly, this Court must review this case and grant the Petition for a Writ of Certiorari on this basis.

III. THE COURTS BELOW ERRED IN CONCLUDING THAT A FINANCIAL TRANSACTION CAN BE MONEY LAUNDERING IN VIOLATION OF 18 U.S.C. § 1956(a)(1)(A)(i) WITHOUT DIRECT PROOF EITHER THAT THE FUNDS INVOLVED IN THE TRANSACTION WERE THE PROCEEDS OF AN ILLEGAL ACTIVITY OR THAT THE TRANSFER WAS MADE WITH THE INTENT TO FURTHER THAT ACTIVITY.

Count II of the indictment stated, and the government alleged at trial, that the named defendants utilized Western Union over a period of time to transfer "the proceeds of . . . the distribution of a controlled substance . . . with the intent to promote the carrying on of specified unlawful activity," namely, the trafficking of marijuana. As noted above, the government introduced Western Union records for the period of time alleged in the indictment. Although these records purported to show some $405,000 in financial transactions in violation of 18 U.S.C. § 1956(a)(1)(A)(i), the evidence completely failed to connect Engle to any transfers of money that were derived from the distribution of a controlled substance or that had the purpose of promoting marijuana trafficking. In fact, the government's evidence showed only a total of four wire transfers mentioning Engle as either the sender or the recipient. On two occasions, once in December 1993 and once in October 1995, Mayberry sent Engle small amounts of cash. No testimony linked these transfers to the purchase of marijuana. Another transfer was $450 addressed

to Engle from one Darryl Maribell. Louis Wilson, the case agent for the government, had no evidence to link this money with a drug transaction. Finally, Engle wired $1,000 to George Chilikas, his father-in-law, to bail Chilikas out of jail after he was arrested in Texas, a circumstance that Wilson acknowledged was "not unusual." Thus, the evidence introduced by the government with regard to the wire transfers did not demonstrate that Engle used Western Union, or any other means of money transfer, to send the proceeds of the distribution of a controlled substance with the intent to promote the carrying on of marijuana trafficking.

The ruling of the courts below that the evidence could prove a violation of § 1956(a)(1)(A)(i) conflicts with the holding in *United States v. Heaps,* 39 F.3d 479 (4th Cir. 1994). In *Heaps*, the court reversed the defendant's conviction on money-laundering counts that alleged a violation of 18 U.S.C. § 1956(a)(1)(A)(i). As in the present case, the government alleged in *Heaps* that the defendant had made wire transfers of money via Western Union with the intent to promote the carrying on of sales of controlled substances. However, the facts in *Heaps* showed only that the defendant had wired money to pay for certain controlled substances. The court found two separate reasons why such conduct was not a violation of § 1956(a)(1)(A)(i). First, focusing on the complete lack of evidence regarding the relationship between the wire transfers and any future drug sales, the court stressed that the jury could not simply infer the intent to promote future unlawful activity from the fact that the transfer occurred at the time of the purchase of controlled substances. The court specifically rejected the government's claim that the wire transfer, which was actually the payment for drugs already obtained, could be considered to be a means of creating goodwill for subsequent drug transactions. Next, the court concluded that had Congress intended the money-laundering statute to cover the payment for drugs every sale of drugs

would be an automatic money-laundering violation as soon as money changed hands, an interpretation which would criminalize the same conduct as prohibited by the drug laws. Therefore, the court reversed the defendant's conviction on the money-laundering charges. *See also United States v. Baker,* 985 F.2d 1248 (4th Cir. 1993) (money-laundering conviction reversed where evidence was insufficient to prove that money was product of drug transactions).

The principle found in *United States v. Heaps,* that there must be substantial evidence to support all of the elements of § 1956(a)(1)(A)(i), including proof for each transaction of the intent to promote the alleged unlawful activity such as the trafficking of marijuana, compels the conclusion in this case that the government's evidence with regard to Count II was legally insufficient. Again, no evidence was introduced connecting the transactions attributable to Engle to an intent to promote the trafficking of marijuana. Without such evidence of specific intent, the proof of the alleged offense was incomplete and Engle's conviction was invalid.

Thus, this Court must grant the Petition for Writ of Certiorari to resolve the conflict in the circuits over what constitutes sufficient evidence to establish proof of money laundering under 18 U.S.C. § 1956. In particular, this Court may use this case to determine whether a jury may simply infer the intent to promote future unlawful activity from the fact that a transfer occurrs at the time of the purchase of controlled substances.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Marlan Everette Engle, requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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No. 99 -

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MARLAN EVERETTE ENGLE,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Appendix

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CASE NO. 96-51-E
	)	
OSCAR HERNAN PENA, et al.	)	

ORDER

This cause is before the court on defendant MARLAN EVERETT ENGLE's Motion To Dismiss The Indictment For Multiplicity, Duplicity, Or In The Alternative, To Require An Election Of The Alternate Count For Prosecution By The Government, filed on 12 July 1996 (Doc.#236).

The defendant asserts that (1) the indictment is "improperly multiplicious" because the charge in count I could include the handling of funds in drug distribution, while count II charges the illegal participation in the handling of funds, and (2) the indictment is "improperly duplicious" because the defendant is charge with participation in many separate and distinct transactions, making it possible for a jury to convict the defendant of conspiracy based upon his participation in "one suspect transaction".

In its response, the government argues that the indictment is not multiplicious - and thereby defective - since the charges in the two counts require different elements of proof, and (2) the indictment is not duplicitous because it charges one conspiracy which included several acts and which consisted of several persons, including the defendant. For the reasons which follow, the court finds that the defendant's motion should be DENIED.

The defendant's suggestion that proof of the acts which constitute money laundering is also usable by the prosection as proof of the conspiracy is not fatal to the indictment. To prove a drug conspiracy, the government must show an agreement between at least two people and that the objective of the agreement was a violation of the law. ***United States v. Escobar***, 50F.3d 1414, 1419 (8th Cir.1994). To prove money laundering, the government must show that a defendant conducted or attempted to conduct a financial transaction with money he knew to be proceeds of an unlawful activity, with the purpose of concealing or disguising the nature, location, source, ownership, or control of the proceeds. ***United States v. Flynt***, 15 F.3d 1002, 1007 (11th Circ. 1994). agreement's [sic]

Although proof of money laundering may constitute evidence of a conspiracy or of an overt act, it is not required for a conviction. Indeed, the government is not required to prove an overt act in furtherance of the conspiracy; thus it is not necessary to show that the defendant engaged in money laundering to establish his criminal liability for a drug conspiracy. Inasmuch as counts I and II of the indictment charge separate offenses, neither of which is a lesser included offense to the other, the indictment cannot be deemed multiplicious.

Nor is the indictment duplicitous. Once the government proves an agreement which includes the defendant, all of his acts - and all of the acts of his co-defendants - done in furtherance of the agreement or conspiracy are generally admissible. ***See United States v. Pinkerton***, 328 U.S. 640, 647, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489 (1946).

In any case, the court has the discretion to reconsider any of the challenged evidence at trail or to instruct the jury regarding certain evidence as a means of safeguarding the defendant's right to a fair and impartial trial. Consistent with

the court's responsibility to preserve judicial resources, however, the court declines to make a pretrial determination that the evidence should be excluded.

DONE this 19th day of November, 1996.

Truman Hobbs

UNITED STATES DISTRICT JUDGE

[PUBLISH]

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
05/10/99
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6217

D.C. Docket Nos. CR-96-51-E-7

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TONY LAVERNE PRUITT, OSCAR HERNAN PENA, MIGUEL A. GARRIDO, DAAIYAH JAMEELAH MUSTAFA, DOUGLAS GENE MAYBERRY and MARLAN EVERETTE ENGLE,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Alabama

(May 10, 1999)

Before DUBINA and BARKETT, Circuit Judges, and JONES*, Senior Circuit Judge. JONES, Senior Circuit Judge:

This is a direct criminal appeal brought by six defendants found guilty of conspiring to possess with intent to distribute marijuana, in violation of 21 U.S.C. §846; and laundering their drug proceeds thereafter, in violation of 18 U.S.C.§1956(a)(1)(A)(i). The six defendants-appellants are Tony Pruitt, Oscar Pena, Miguel Garrido, Daaiyah Mustafa, Douglas Mayberry, and Marlan Engle. At issue, with respect to Pena and Garrido, is the constitutionality of a motor vehicle search conducted on July 29, 1995. Pursuant to Knowles v. Iowa, ___ U.S. ___, 119 S.Ct. 484 (1998) - a Supreme Court decision issued subsequent to the trial of this matter - and earlier Eleventh Circuit precedent, we find the search of defendants' vehicle violative of the Fourth Amendment, and therefore reverse. In all other respects, we affirm the convictions and sentences of the remaining co-defendants.

I.

The drug conspiracy at issue in this case transported marijuana from California, and other western locales, to Alabama, where the drugs were distributed and sold. Pena and Garrido, located in Los Angeles, supplied the marijuana. The Alabama-based Engle and Mayberry purchased the drugs with funds wired to Los Angeles Thereafter, couriers, working on behalf of the conspiracy, traveled to California and other destinations, and returned to Alabama with the purchased marijuana. The drugs were distributed in Alabama via two networks: one operated by Engle (based in Birmingham); the other, by Mayberry (based in Tuskegee).

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*Honorable Nathaniel R. Jones, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

The six defendants were indicted in the Middle District of Alabama in March 1996. Each was charged with having violated 21 U.S.C. §846 (Count I, the conspiracy count) and 18 U.S.C. §1956(a)(1)(A)(i) (Count II, the money laundering count). Following the taking of individual not-guilty pleas, all six proceeded to trial, with the assistance of counsel, in December 1996. The jury found Pruitt guilty of Count I only, and the remaining five co-defendants guilty of both Counts I and II. Thereafter, the co-defendants were sentenced to incarceration terms as follows: Pruitt, Pena and Garrido: 80 months; Mustafa: 96 months; Engle: 240 months; and Mayberry: 292 months. All six co-defendants now timely appeal.

II.

The subject stop and search occurred near an Interstate 40 exit ramp in Memphis, Tennessee.[1] (Pena was apparently transporting marijuana from California to Alabama, by way of Tennessee.) Just after midnight on July 29, 1995, Pena was pulled over for speeding by Officer Joseph Moore of the Shelby County, Tennessee Sheriff's Department.[2] Garrido was then a

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[1]Pena does not challenge the constitutionality of his stop, just his subsequent detention and search. We agree that, because Pena was speeding, and a traffic violation had thus occurred, probable cause existed for the stop. Accordingly, the stop was reasonable for purposes of the Fourth Amendment, and withstands review. See Whren v. United States, 517 U.S. 806, 810 (1996); United States v. Griffin, 109 F.3d 706, 707 (11th Cir. 1997) (per curiam). Thus, we limit our discussion to the constitutionality of Moore's post-stop conduct.

[2]Although Moore testified at trial that Pena was also stopped because he "rolled through a stop sign," J.A. vol. 13, at 65, Moore never so advised Pena. Nor did Moore cite Pena

passenger in the vehicle, along with two others not parties to this appeal.

The stop was automatically recorded on Moore's police videocamera. The resulting videotape (Gov't Ex. 344(c)) shows the following sequence of events:

> 1. Moore asked Pena to step out of the van, and Pena did so. Pena accompanied Moore to the rear of the van;
>
> 2. Moore advised Pena that he was speeding - traveling 65 miles per hour in a 55 m.p.h. zone. In broken but understandable English, Pena apologized to Moore. Moore responded by asking Pena his age, and whether he owned the van;
>
> 3. Moore directed Pena to accompany him to his police car, so he could check on the status of Pena's driver's license and issue him a speeding ticket;
>
> 4. Once in the police car, Moore began asking Pena questions unrelated to the stop, e.g., where Pena's family resides in Memphis. Moore then asked Pena if his registration and insurance papers were in the van. Pena responded affirmatively, and Moore left to retrieve them;
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> 5. Standing outside the van, Moore asked Garrido (in the front passenger seat) for the

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for that offense. See J.A. vol. 1, doc. 549, ex. A (listing "speeding" as Pena's sole violation). Accordingly, we view this as a case in which Pena was simply stopped for speeding.

registration and insurance papers. He also asked the two other passengers who they were going to visit in Memphis, and that person's street address;

6. Moore returned to his police car where, instead of completing Pena's ticket, he proceeded to ask Pena: (a) to identify the three other van passengers; (b) how much he paid for the van; (c) what kind of work he does for a living; (d) whether Garrido is his brother; and (f) why they have different last names;

7. Again postponing the writing of Pena's ticket, Moore asked Pena if he had anything illegal in the van; Pena said "no." Moore followed up by asking Pena if he had pistols or weapons in the van; Pena again said "no." Moore then asked Pena if he had drugs in the van; Pena said "no" a third time;

8. Moore, having no reasonable suspicion of criminal activity by Pena, nonetheless asked him if he could search the van. To that end, he handed Pena a written consent form - in Spanish - to be signed. Pena declined to sign the form, see J.A. vol. 1, doc. 549, ex. B, whereupon Moore told him that he needed yet additional time to complete the writing of the speeding ticket. Instead of completing the ticket, however, Moore picked up his police radio to declare that, "I have a refusal" - a code phrase indicating to the other officers that they should bring a drug-sniffing dog to the scene;

9. While awaiting the dog's arrival, which took more than fifteen minutes, Moore detained in his police car - again without a reasonable suspicion of criminal activity-Pena, Garrido, and the other two van passengers as well. While waiting, Moore finally issued a "courtesy warning" to Pena instead of a traffic ticket. See id., ex. A; and

10. Nearly one-half hour after Pena's initial stop, the drug dog arrived. The dog sniffed the outside of the van, and indicated the presence of drugs. The van was then searched by Moore and other officers acting without a warrant. The search revealed significant amounts of marijuana (approximately 81 pounds). Pena and Garrido were arrested and read their Miranda rights (in English and in Spanish).

Following his guilty finding, Pena challenged the constitutionality of Moore's search in a Fed. R. Crim. P. 33 motion for a new trial. [3]See J.A. vol. 1, doc. 549. The district

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[3]The motion was based, in part, upon Pena's concern that Moore was biased against him, and may have committed perjury at trial. This is more than mere speculation on Pena's part: just prior to Pena's sentencing, the prosecuting Assistant United States Attorney wrote to the district judge below to advise him that Moore had apparently provided false testimony in a suppression hearing conducted in an unrelated case. See J.A. vol. 1, doc. 549, ex. C. In that case, as here, Moore stopped a motorist for speeding, detained the occupants, searched the vehicle, and found drugs. Moore's supposedly perjurious testimony in the unrelated case centered on whether or not he wrote the speeding ticket on the scene, as he claimed. Subsequent forensic testing appeared to suggest that Moore

court denied the motion, finding that Moore's conduct leading up to his search was supported by the required reasonable suspicion of Pena's guilt. Id., doc. 561 at 5-7. We review that decision for an abuse of discretion. United States v. Pope, 132 F.3d 684, 687-88 (11th Cir. 1998). This standard includes review to determine whether the district court was guided by an erroneous legal conclusion. Koon v. United States, 518 U.S. 81, 100 (1996). "A district court by definition abuses its discretion when it makes an error of law." Id.

III.

We addressed the constitutionality of detentions following a routine traffic stop in United States v. Tapia, 912 F.2d 1367 (11th Cir. 1990), where we held:

> In the absence of consent, the reasonableness of [police officer] Guthrie's

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wrote the speeding ticket after the arrest, then lied under oath about when the ticket was written. Id.

Pena and Garrido now argue that Moore's apparent bias is a sufficient grounds upon which to award them new trials. In light of our finding below - that Moore violated their Fourth Amendment rights - Pena and Garrido are each entitled to a reversal of their convictions. Thus, the merits of their "bias argument" need not be reached. Nonetheless, we are severely troubled by the allegations of Moore's perjurious conduct in another case, and his violation of the Fourth Amendment in this case. As police officers well know, evidence which constitutes the "fruit of a poisonous tree" is inadmissable to prove a criminal suspect's guilt. Wong Sun v. United States, 371 U.S. 471, 488 (1963). Convictions, such as those at issue in this appeal, will withstand review only if they are consistent with the Fourth Amendment.

decision to detain and search the vehicle in which appellant Bernardino Tapia was a passenger is governed by the principles set forth in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d. 889 (1968). According to Terry, even in the absence of probable cause, police may stop persons and detain them briefly in order to investigate a reasonable suspicion that such persons are involved in criminal activity. In justifying such an intrusion, the "reasonableness" standard requires that a police officer "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21, 88 S.Ct. at 1879 (footnote omitted). In this regard, "reasonable suspicion" is determined from the totality of the circumstances, United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989), and from the collective knowledge of the officers involved in the stop. United States v. Williams, 876 F.2d 1521, 1524 (11th Cir.1989); United States v. Cotton, 721 F.2d 350, 352 (11th Cir.1983), cert. denied, 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984). Such a level of suspicion is obviously considerably less than proof of wrongdoing by a preponderance of the evidence, INS v. Delgado, 466 U.S. 210, 217, 104 S.Ct. 1758, 1763, 80 L.Ed.2d 247 (1984), or even the implicit requirement of probable cause that a fair probability that evidence of a crime will be found. Sokolow, 109 S.Ct. at 1585. Nevertheless, "reasonable suspicion" must be more than an inchoate "hunch," and the [F]ourth [A]mendment accordingly requires

> that police articulate some minimal, objective justification for an investigatory stop. Id; Williams, 876 F.2d at 1524.

Id. at 1370 (brackets added; footnote deleted). Since the issuance of Tapia, we have consistently held that once an officer has briefly stopped a motor vehicle operator for the purpose of issuing a traffic violation (i.e., a ticket), the officer's continuing detention of the vehicle's occupants is authorized under the Fourth Amendment only if the officer can point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." Griffin, 109 F.3d at 708 (citing Tapia, 912 F.2d at 1370); accord United States v. Holloman, 113 F.3d 192, 196 (11th Cir. 1997) (per curiam) (noting that a police stop cannot otherwise last "any longer than necessary to process the traffic violation"). Our sister circuits are of the same view. In United States v. Hunnicutt, 135 F.3d 1345 (10th Cir. 1998), for example, the Tenth Circuit, consistent with Tapia, found:

> An officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation. See United States v. Gonzalez-Lerma, 14 F.3d 1479, 1483 (10th Cir.), cert. denied, 511 U.S. 1095, 114 S.Ct., 1862, 128 L.Ed.2d 484 (1994). The investigative detention usually must "last no longer than is necessary to effectuate the purpose of the stop," and "[t]he scope of the detention must be carefully tailored to its underlying justification." Florida v. Rover, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983).
>
> Lengthening the detention for further questioning beyond that related to the initial

stop is permissible in two circumstances. First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring. See United States v. Soto, 988 F.3d 1548, 1554 (10th Cir.1993). Second, further questioning unrelated to the initial stop is permissible if the initial detention has become a consensual encounter. See Gonzalez-Lerma, 14 F.3d at 1483. The officer had not returned Mr. Hunnicutt's license at the time he asked about guns and drugs, so further questioning unrelated to the initial stop must have been supported by an objectively reasonable suspicion of illegal activity. See id.; United States v.McKneely, 6 F.3d 1447, 1451 (10th Cir.1993) (holding that encounter cannot become consensual while officer retains driver's documents).

A variety of factors may contribute to the formation of an objectively reasonable suspicion of illegal activity. Among those factors that have justified further questioning are having no proof of ownership of the vehicle, having no proof of authority to operate the vehicle, and inconsistent statements about destination. See United States v. Jones, 44 F.3d 860, 872 (10th Cir.1995); Gonzalez-Lerma, 14 F.3d at 1483-84; United States v. Pena, 920 F.2d 1509, 1514 (10th Cir.1990), cert. denied, 501 U.S. 1207, 111 S.Ct. 2802, 115 L.Ed.2d 975 (1991). Also among those are driving with a suspended license, see Jones, 44 F.3d at 872, and reluctance to stop, see id.; Villa-Chaparro, 115 F.3d at 802; United States v. Walraven, 892

> F.2d 972, 975 (10th Cir.1989). In particular, the inability to offer proof of ownership or authorization to operate the vehicle has figure prominently in many of our cases upholding further questioning. See United States v. Horn, 970 F.2d 728, 732 (10th Cir.1992); United States v. Turner, 928 F.2d 956, 959 (10th Cir.), cert. denied, 502 U.S. 881, 112 S.Ct. 230, 116 L.Ed.2d 187 (1991); United States v. Arango, 912 F.2d 441, 447 (10th Cir.1990), cert. denied, 499 U.S. 924, 111 S.Ct. 1318, 113 L.Ed.2d 251 (1991); see also United States v. Fernandez, 18 F.3d 874, 879 (10th Cir.1994) (The "defining characteristic of our traffic stop jurisprudence is the defendant's lack of . . . some . . . indicia of proof to lawfully operate and possess the vehicle in question, thus giving rise to objectively reasonable suspicion that the vehicle may be stolen.")

Id. at 1349.

Tapia and Hunnicutt are both in conformance with Knowles. In Knowles, the Supreme Court invalidated a car search under the Fourth Amendment, and reversed the driver's drug conviction, because "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." Knowles, 119 S.Ct. at 488. Writing for a unanimous court, Chief Justice Rehnquist reasoned that routine traffic stops are "relatively brief encounter[s]...'more analogous to a so-called 'Terry stop' than to a formal arrest.'" Id. (ellipsis added and deleted) (quoting Berkemer v. McCarty, 468 U.S. 420, 437 (1984)). The High Court further reasoned that, because

Knowles was cited for speeding, but not arrested, the search of his car was not authorized by the "search incident to arrest" doctrine, even though the state traffic laws under which Knowles was cited provided for arrest as an alternate police remedy. Id. at 486-87. The Court found the search incident to arrest doctrine supported by two historical rationales - "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use a trial" - neither of which applies in a routine stop where, without more, an officer just has evidence of a traffic violation. Id. at 487.

Such is the case here. At the time Pena, Garrido and the others were, Moore had before him evidence of speeding. His questioning following the stop, therefore, should have been directed to securing Pena's license, registration and insurance papers. Once such brief questioning was completed, Pena and the others should have been free to go, as Moore was provided at that time with no reasonable suspicion of their criminal activity. In such circumstances, additional "fishing expedition" questions such as "What do you do for a living?" and "How much money did your van cost?" are simply irrelevant, and constitute a violation of Terry.

Our viewing of the police videotape leaves us with the impression that Moore was acting on an unsupported hunch instead of a reasonable suspicion that Pena and Garrido had broken anything other than the speeding laws.[4] As Tapia and

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[4]The fact that Moore's hunch ultimately turned out to be correct - i.e., that Pena and Garrido *were* illegally transporting marijuana in their van - is irrelevant for purposes of the Fourth Amendment. To hold otherwise would open the door to patently illegal searches by government officials, who would attempt to justify the legality of their conduct after-the-fact. The Fourth Amendment requires a showing of reasonable suspicion at the time the motor vehicle occupants are detained,

Hunnicutt make clear, a lengthy detention and car search under such circumstances violate the Fourth Amendment. Although we resist the temptation to read an improper motive into Moore's conduct, we are concerned that this appears to be yet another case in which a driver, once stopped, is unreasonably detained because of his/her race or national origin (Pena and Garrido are both Hispanic), or because the driver is from out-of-state (Pena's van had California license plates). Accord Tapia, 912 F.2d at 1371 ("[T]he factors cited by the district court in this case, e.g., being Mexican, having few pieces of luggage, being visibly nervous or shaken during a confrontation with a state trooper, or traveling on the interstate with Texas license plates (not yet a crime in Alabama), do not provide a minimal, particularized basis for a conclusion of reasonable suspicion on the part of Officer Guthrie. Even when considered together and in light of all the facts, such observations fail to suggest that appellant and his brother were engaged in any criminal activity other than speeding on the highway").

IV.

The convictions of Pena and Garrido are therefore **REVERSED** to the extent that they turn on Moore's unconstitutional detention and search. To that end, this matter

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not thereafter, once the results of the car or van search are know. Scott v. United States, 425 U.S. 917, 923 (1976) (Brennan, J., dissenting from the denial of certiorari) ("[T]here is a grave danger that determinations of reasonableness will be dictated by hindsight evaluations of evidence uncovered by [searches]. This, in turn, is bound to generate a strong temptation to [search] first and then use the fruits of the [search] in an effort to demonstrate that the [search] was justified. Courts have repeatedly refused to validate searches and seizures in this after-the-fact manner . . .").

is **REMANDED** to the district court; in all other respect, Pena's and Garrido's convictions are **AFFIRMED**.

Having carefully reviewed each of the other arguments presented by the remaining co-defendants, we find those arguments without merit, and therefore **AFFIRM** the convictions and sentences of appellants Pruitt, Mustafa, Mayberry and Engle pursuant to 11th Cir. R. 36-1.[5]

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[5]That rule provides:

Rule 36-1. Affirmance Without Opinion

When the court determines that any of the following circumstances exist:

> (a) the judgment of the district court is based on findings of fact that are not clearly erroneous;
> (b) the evidence in support of a jury verdict is sufficient;
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
> (d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
> (e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
AUG - 5 1999
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6217

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TONY LAVERNE PRUITT, DOUGLAS GENE MAYBERRY, MARLAN EVERETTE ENGLE, OSCAR HERNAN PENA, MIGUEL A. GARRIDO, DAAIYAH JAMEELAH MUSTAFA,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Alabama

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ON PETITIONS(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: DUBINA and BARKETT, Circuit Judges, and JONES*, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

*Honorable Nathaniel R. Jones, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

United States District Court
Middle District of Alabama

UNITED STATES OF AMERICA **JUDGMENT IN A CRIMINAL CASE**

v. (For Offenses Committed On or After November 1, 1987)

MARLAN EVERETT ENGLE Case Number:**3:96CR00051-005**

John O. Cameron
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)_____

☐ pleaded nolo contendere to count(s)_____ which was accepted by the court,

☒ was found guilty on count(s) **1 and 2** after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Conspiracy to Distribute and Possess with Intent to Distribute Marijuana	03/27/1996	1
18 U.S.C. § 1956 (a)(1)(A)(i)	Laundering of Monetary Instruments	03/27/1996	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____

☒ Count(s) 3 is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: **546-15-5535**

Defendant's Date of Birth: **10/13/1956**

Defendant's USM No.: **09736-002**

Defendant's Residence Address:

6860 County Road 33

Ashville, AL

Defendant's Mailing Address:

7767 Old Dixiana Road

Pinson, AL 35126

03/05/1997

Date of Imposition of Judgment

Truman M. Hobbs

Signature of Judicial Officer

TRUMAN M. HOBBS

UNITED STATES DISTRICT JUDGE

Name & Title of Judicial Officer

3/6/97

Date

DEFENDANT: **MARLAN EVERETT ENGLE**
CASE NUMBER: **3:96cr00051-005**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 240 month(s).

This term consists of 240 months on Count I and 240 months on Count II, such terms to be served concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends that the defendant be designated to a facility where intensive residential substance abuse treatment and mental health counseling are available.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: **MARLAN EVERETT ENGLE**
CASE NUMBER: **3:96cr00051-005**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 year(s)**.

This term consists of terms of five (5) years as to Count I and three (3) years as to Count II, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person

convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **MARLAN EVERETT ENGLE**
CASE NUMBER: **3:96cr00051-005**

SPECIAL CONDITIONS OF SUPERVISON

1. If determined necessary by the probation officer, the defendant shall participate in a substance abuse treatment program as directed by the probation officer.

2. The defendant shall participate in a mental health treatment program as directed by the probation officer.

Judgment-Sheet 3.01

DEFENDANT: **MARLAN EVERETT ENGLE**
CASE NUMBER: **3:96cr00051-005**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 100.00**	**$ 0.00**	**$ 0.00**

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $_____

Special Assessment consists of $50.00 on each of Counts I and II.

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ **0.00**.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

RESTITUTION

□ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

□ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	****Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
Totals:	$ _____	$ _____	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

DEFENDANT: **MARLAN EVERETT ENGLE**
CASE NUMBER: **3:96cr00051-005**

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation Officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____(*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The District Court will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary penalty payments are to be made to the United States District Court, Middle District of Alabama, Post Office Box 711, Montgomery, Alabama 36101, except those payments made through the Bureau of Prison's Inmate Financial Responsibility Program. Any balance which remains unpaid at the commencement of supervision shall be paid according to a schedule determined by the probation officer.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment.

DEFENDANT: **MARLAN EVERETT ENGLE**
CASE NUMBER: **3:96cr00051-005**

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: **33**
Criminal History Category: **VI**
Imprisonment Range: **235** to **293** months
Supervised Release Range: **4** to **5** years
Fine Range: $ **17,500.00** to $ **2,500,000.00**

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ **0.00**

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of

any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

Sentence of 240 months to reflect the severity of defendant's prior criminal record and role of leadership in this conspiracy.

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):